Filed 9/30/03 P. v. Hewett CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES KELLY HEWETT, Defendant and Appellant.	A100561 (Sonoma County Super. Ct. No. SCR29973)

INTRODUCTION

James Kelly Hewett appeals from the judgment of conviction entered upon his plea of guilty to making a false bomb report to a peace officer (Pen. Code, § 148.1, subd. (a)). The court sentenced appellant to a three-year aggravated prison term. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 29, 2000, appellant was charged with the felony offense of falsely reporting a bomb. A security guard at the Santa Rosa Plaza shopping mall received a call on September 28, 2000, from someone reporting that a man was taping an object to the front of a store. Upon investigating the matter, the security guard saw appellant taping an object to the store. When the security guard questioned appellant about the device, appellant replied that it was a bomb. The security guard immediately placed appellant in handcuffs. The security guard testified that appellant appeared physically disheveled, acted disoriented and appeared to be talking to himself once he was placed in handcuffs.

Santa Rosa Police Officer Hargrove was dispatched to the scene to investigate the suspected device. Upon his arrival, Officer Hargrove questioned appellant, whom the security guard had already detained, and asked appellant about the device. Appellant answered that it was a bomb. Officer Hargrove testified that appellant was confused, disoriented, and was talking to himself, and that he arrested appellant and placed appellant on a 72-hour mental health hold. Officer Hargrove also testified that the materials in the object he described having seen taped to the store did not contain explosives.

After the court appointed a clinical psychologist to examine appellant and the court found appellant mentally incompetent to proceed, it committed appellant to Atascadero State Hospital on October 31, 2000, until he became mentally competent, or for a maximum term of three years. On March 19, 2001, appellant was found to be mentally competent and the criminal proceedings were reinstated.

On September 6, 2001, the court suspended the imposition of sentence and imposed a conditional sentence of formal probation for 36 months, based on a finding of "unusual circumstances." The conditions of probation included participating in and completing all treatment recommended by F.A.C.T. (an intensive mental illness treatment program) and the Sonoma County Probation Department. After appellant refused to comply with the F.A.C.T. treatment program, a probation violation was reported. On March 19, 2002, the court suspended criminal proceedings and again appointed the clinical psychologist to examine appellant. The court found appellant mentally incompetent on April 4, 2002, and committed him to Atascadero State Hospital again for a maximum period of three years on April 8, 2002. Appellant was admitted to Patton State Hospital on June 12, 2002. On August 26, 2002, the court found appellant mentally competent and reinstated criminal proceedings.

After appellant admitted his failure to report to the required program, the court revoked probation on October 16, 2002, and sentenced appellant to the aggravated term

of three years in state prison. Appellant received 833 days of credit. The court cited to the probation report and stated that because appellant is not interested in pursuing either the F.A.C.T. program, or any other programs, the court was left with limited options such as imprisonment. The court further stated it would urge the Department of Corrections to help appellant with his mental illness.

In sentencing appellant to the aggravated term, the court found that appellant has engaged in violent conduct, he had numerous prior adult convictions, and his prior performance on a conditional sentence was unsatisfactory.

DISCUSSION

Appellant contends the court should not have imposed the aggravated term because it failed to consider any mitigating factors including appellant's mental illness under California Rules of Court, rule 4.423 (b)(2).[1] Although appellant concedes that he has a long record of offenses, he contends also that because those offenses were minor in nature, the court should not have relied on his prior record to support an aggravated sentence. Appellant also claims that the court erred in its application of rule 4.421(b)(5) because he has never been granted formal probation and the record does not show any other probation violations. Lastly, appellant argues that the court erred in its application of rule 4.421(b)(1) that "[t]he defendant has engaged in violent conduct which indicates a serious danger to society" because there was no violence involved in the false bomb report other than that implicit in the crime.

Sentencing courts have wide discretion in weighing aggravating and mitigating factors. Such courts may balance those factors against each other in qualitative as well as quantitative terms. An appellate court must affirm the sentence unless there is a clear showing the sentence choice was arbitrary or irrational. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.)

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[1] All further rule references are to the California Rules of Court.

A court may minimize or even entirely disregard mitigating factors without stating its reasons. The court is not required to set forth its reasons for rejecting a mitigating factor. Further, unless the record affirmatively reflects otherwise, the court will be deemed to have considered the relevant criteria, such as mitigating circumstances, enumerated in the sentencing rules. (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318.) As appellant contends, rule 4.423(b)(2) states that mitigating circumstances include a situation where the defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime. (Rule 4.423(b)(2).)

Here, the court sufficiently considered the appellant's possible mitigating circumstance of mental illness. At the sentencing hearing, the court acknowledged appellant's illness as a source of his problems with the law when it initially recommended the F.A.C.T. program as the non-prison solution for appellant. Further, the court addressed the fact that the purpose of the county's F.A.C.T. program was to provide assistance to people similarly situated as appellant and emphasized that it was appellant's own choice not to participate. Thus, the court sufficiently considered appellant's mental illness to the extent required by law.

A single circumstance in aggravation is sufficient to impose the upper term of imprisonment. (*People v. Osband* (1996) 13 Cal.4th 622, 728.) Rule 4.421(b)(2) describes circumstances in aggravation to include the fact that "the defendant's prior convictions as an adult . . . are numerous *or* of increasing seriousness." (Rule 4.421(b)(2), italics added.) Appellant concedes that he meets the numerosity rule of rule 4.421(b)(2), yet argues that the offenses are all minor. The court found that the aggregation of these minor offenses, in addition to one felony offense, warrants an aggravated sentence. The record clearly supports that appellant was convicted of numerous crimes, thereby justifying the trial court's finding that numerosity exists.

Similarly, poor performance on probation is also borne out by the record and justifies an aggravating term. Appellant argues that he was never granted formal probation and that therefore his performance on probation could not have been unsatisfactory as was described by the court as a reason to impose an aggravated term. Appellant has not explained what he means when he suggests he has not received "formal probation." Both the clerk's transcript and the reporter's transcript clearly demonstrate that the court granted appellant "formal supervised probation with certain terms and conditions."

Lastly, appellant contends that the court erred in its application of rule 4.421(b)(1), finding that appellant had engaged in violent conduct which indicates a serious danger to society. Assuming the record does not support the trial court's finding under 4.421(b)(1), the record amply supports imposition of the aggravated term in two other particulars. Therefore, even if we accept appellant's last argument, any reliance on 4.421(b)(1), if inappropriate, was harmless.

DISPOSITION

The judgment is affirmed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Lambden, J.